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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 693-N

ATLANTIC COAST LINE RAILROAD COMPANY,
A CORPORATION,
Plaintiff,

vs.

ALABAMA PUBLIC SERVICE COMMISSION, GORDON PERSONS, ITS PRESIDENT, AND JIMMY HITCHCOCK AND C. C. (JACK) OWEN, ASSOCIATE COMMISSIONERS, AND A. A. CARMICHAEL, ATTORNEY GENERAL OF THE STATE OF ALABAMA,
Defendants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, defendants-appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause.

Opinion Below

The opinion of the District Court for the Middle District of Alabama, Northern Division, is reported in ————. A copy of the opinion, findings of fact, conclusions of law and judgment are attached hereto as Appendix A.

Jurisdiction

The judgment of the District Court was entered on August 23, 1950. A petition for appeal is presented to the District Court herewith, to-wit, on October 20, 1950. The appeal herein is from the final decree made and entered by the District Court of the United States specially constituted under Title 28, Sections 2281 and 2284, United States Code, and, as provided in Section 1253, Title 28, United States Code, a direct appeal to the Supreme Court of the United States may be taken from the final decree made by such specially constituted District Court. It is further provided by Title 28, Section 2101(b), that such a direct appeal to the Supreme Court of the United States from such a final decree may be taken within sixty days.

Questions Presented

Where state statutes provide that a railroad may not abandon service unless it first obtains a certificate from the State Public Service Commission allowing such abandonment, and after hearing and consideration, the Commission declines to grant such certificate and the railway files a complaint asking an injunction of a three-judge Federal court.

a. Does a three judge Federal court have jurisdiction of such suit if the railway has made no attack on the constitutionality of the statutes which require that the trains continue operation, but only on the constitutionality of the order which denied the certificate to abandon?

b. Does a three judge Federal court have jurisdiction of such suit if only the constitutionality of the order is attacked, but relief sought in an injunction enjoining the Public Service Commission and other State officers from enforcing any penalties or remedies provided

under State law, which penalties or remedies are not called for by the order or authorized by it?

c. Assuming *arguendo* that there is jurisdiction for a three judge Federal court, should the court abstain from exercising it to enjoin enforcement of State criminal laws where there has been no threat of imminent enforcement of criminal sanctions, no allegation of possible multiplicity of suits, and where any criminal penalties which might be assessed would be only a consequence of violation of the State law?

d. Assuming *arguendo* that there is a jurisdiction for a three judge Federal court, should the court abstain from exercising its jurisdiction in recognition of the wisdom of allowing State courts to try questions of local State policy relating to complicated questions of fact?

Statutes Involved

Code of Alabama 1940, Title 48, Sections 35, 50, 76, 78, 79, 81, 82, 84, 106, 399 and 400; United States Code, Title 28, Sections 1253, 2101(b), 2281 and 2284. The said statutes are set out verbatim or pertinent parts thereof are appropriately summarized in Appendix B hereto.

Statement

Appellee, hereinafter referred to as Atlantic Coast Line has operated trains between Birmingham, Alabama, and Manchester, Georgia, as a part of its railroad system. In May, 1949, Atlantic Coast Line petitioned the Alabama Public Service Commission to allow it to discontinue the daily operation of passenger trains 122 and 123 between the above cities and to substitute in lieu thereof tri-weekly service, pursuant to the requirements of Code of Alabama 1940, Title 48, Sections 35 and 106, which require that no transportation company shall abandon any of its service to the public unless it first shall have filed an application for permit to abandon service and obtained from the Commis-

sion a permit allowing such abandonment. A hearing was had on October 10, 1949, and on April 6, 1950, the Commission entered an order denying Atlantic Coast Line's application for authority to abandon.

Atlantic Coast Line did not ask for a rehearing under Code of Alabama 1940, Title 48, Section 76, nor did it take an appeal from the Commission's order, even though Code of Alabama 1940, Title 48, Section 79, provides for an appeal from any final action or order of the Public Service Commission to the Circuit Court of Montgomery County, Alabama, in Equity, and thence to the Supreme Court of Alabama. Sections 81 and 84 of Title 48 provide that on any such appeal the order or action appealed from may be stayed or superseded by the State Appellate Court, or the Judge thereof, upon hearing after consideration of the testimony taken before the Commission, and, except in rate cases not here involved, such supersedeas may be ordered by the said Court or judge without the requirement of a supersedeas bond. Section 82 of Title 48 provides that the Appellate Court shall hear the case upon the certified record and shall set aside the order of the Commission if the Court finds that the Commission erred to the prejudice of appellant's substantial rights in its application of the law, or that the order was based upon a finding of facts contrary to the substantial weight of the evidence.

Instead Atlantic Coast Line filed its complaint in the United States District Court for the Middle District of Alabama, basing jurisdiction upon alleged Federal questions involved, and upon diversity of citizenship, and asked for convocation of a district court of three judges and a hearing under the provisions of United States Code, Title 28, Section 2284. Atlantic Coast Line alleged that the revenue received from operation of trains 122 and 123 was disproportionate to expenses and that the continuation of such

trains was not required by public convenience and necessity. There were allegations that the Commission's order deprived Atlantic Coast Line of its property without due process, that it was being denied equal protection of the law, that interstate commerce was being burdened and that the order was unjust and confiscatory.

Atlantic Coast Line has not in its pleadings, or at the trial, made an attack upon the constitutionality of any State statute of the State of Alabama. The only attack on constitutional grounds was directed at the Commission's order of April 6, 1950.

Appellants first filed with Hon. Charles B. Kennamer, Judge of the United States District Court for the Middle District of Alabama, a petition directed to him individually, asking that he stay the call for a three judge Federal court. No formal order was issued by Judge Kennamer, but this motion was ruled upon by the three judge court after it convened, along with other motions. Thereafter appellants filed a motion to dismiss, a motion to stay and an answer. After oral argument on August 14, 1950, all of appellant's motions were overruled and it was then stipulated by counsel for the parties that evidence should be taken and the case submitted on Atlantic Coast Line's prayer for a permanent injunction. Thereafter, on August 23, 1950, the Court issued its final judgment and decree overruling all of appellant's motions, declaring the Commission's order of April 6, 1950, to be null and void, and enjoining the appellants, their successors in office and their agents, servants and attorneys from taking any steps or proceedings of any nature whatsoever against the Atlantic Coast Line to enforce the order of April 6, 1950, or to enforce any fine, forfeitures, penalties or other sanctions provided by Title 48, Code of Alabama 1940, or any remedies against the plaintiff, its officers, agents or employees on

account of the failure to observe the provisions and requirements of said order by discontinuing the daily operation of plaintiff's passenger trains 122 and 123 between Birmingham, Alabama, and Manchester, Georgia, insofar as they are operated within the State of Alabama, and substitute in lieu thereof tri-weekly service.

The Questions Are Substantial

The questions involved in this appeal are similar to those raised in several recent cases before this Court, among them being:

Railroad Commission of Texas v. *Pullman Co.*, 312 U. S. 496, 61 S. Ct. 643 (1941);

Burford v. *Sun Oil Co.*, 319 U. S. 315, 63 S. Ct. 1098 (1943);

Deal et al v. *Missouri Pac. R. R. Corp.*, 312 U. S. 45, 61 S. Ct. 418 (1941);

Ex parte Bransford, 310 U. S. 354, 60 S. Ct. 947 (1940).

There are involved the same fundamental issues of how far the Federal judiciary has jurisdiction over local questions which can be adjudicated by State courts, and to what extent Federal courts should exercise jurisdiction which they do have over such questions where there is ample provision for judicial determination within the framework of State courts. The decision of the three judge District Court in finding that it had jurisdiction is in direct conflict with the language of the statute under which it was convened, and even had there been jurisdiction the decision is contrary to the clear policy set out in numerous recent decisions of the Supreme Court that Federal courts will stay their hand on local matters until the State courts have ruled.

I. As appellants read Title 28, United States Code, Section 2281, three requirements must be met before there is jurisdiction for a special three judge Federal court.

a. An interlocutory or permanent injunction must be sought.

b. The injunction must be sought on the ground that a State statute is unconstitutional. (*Oklahoma Natural Gas Company v. Russell,* 281 U. S. 290, 43 S. Ct. 353 (1923) interprets "statute" as including "order.")

c. The injunction must seek restraint of enforcement, operation or execution of the statute or order whose constitutionality is attacked. Appellants submit that there can be real question of this in view of the specific language of the statute:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any state statute (including 'order' since the *Oklahoma* case) . . . shall not be granted . . . upon the ground of the unconstitutionality of *such* statute (including 'order' since the *Oklahoma* case)."

Atlantic Coast Line's complaint failed to meet requirements "b" and "c" as to any Alabama statute. No attack was made on the constitutionality of any of the statutes or laws of the State of Alabama and it has not asked for an adjudication of constitutionality of any statute of the State of Alabama. The prayer for relief includes statutes in the requested cloak of protection, for it refers to "any penalties or other remedies that may otherwise accrue or be given against plaintiff, its officers, agents and employees on account of its or their failure to observe the provisions and requirements of the order of the Commission." However, the statutes included are neither identified nor their constitutionality attacked.

As to the Commission's order of April 6, 1950, it is squarely charged to be unconstitutional, but the complaint did not ask relief in terms of the order but went far beyond

that and sought an injunction against all possible penalties and remedies under Alabama law, a much broader field of relief than the language of Section 2281 allows,—injunction against "enforcement, operation or execution" of "such statute or such order." Atlantic Coast Line's prayer and the Court's decree would include even common law remedies, which is a broad extension of Section 2281. And the Alabama Supreme Court has held that orders of the Commission may be enforced by the courts by issuance of writs of mandamus.

Alabama Public Service Commission v. *Western Union Telegraph Co.*, 208 Ala. 243, 94 So. 472 (1922).

Atlantic Coast Line has sought to create a new field for Federal jurisdiction by using allegations of unconstitutionality of an order as a springboard to get into court while seeking relief from a constitutional statute, and from any and all forms of redress to which it might be subject whenever it wishes to violate the laws of the State.

The theory of the District Court seemed to be that it could enjoin whatever penalties and remedies, statutory or common law, as it saw fit in order to give effective relief as a duly convened court of equity. But this is "bootstrap law," since jurisdiction is conferred initially only if relief is sought from the statute (or order) whose constitutionality is questioned. The three judge court cannot, by the broad scope of its relief, confer jurisdiction upon itself retrospectively, if the complaint averred no case quickening the special jurisdiction of the statutory-created court. The three judge court is of statutory creation and its jurisdiction is to be strictly limited by the statute which created it, and is not to be lightly extended.

Okla. Gas & Elec. Co. v. *Okla. Packing Co.*, 292 U. S. 386, 54 So. Ct. 732 (1934);

Phillips v. *U. S.*, 312 U. S. 246, 61 S. Ct. 480 (1941).

Too, it is noteworthy that the extraordinary relief obtained, going far beyond the relief against "such statute" (N. B., or "order") authorized by Section 2281, is exactly the relief prayed for by the Atlantic Coast Line from the very beginning, and the complaint was challenged by appellants on jurisdictional grounds before the three judges ever convened (by motion directed to Judge Charles B. Kennamer individually) and challenged again after the three judge court convened but before any evidence was taken and before the court ruled that it had jurisdiction to proceed. This is no special case of equity giving extraordinary relief where it cannot give that asked out of equity giving the relief prayed for.

The "negative order" doctrine of *Standard Oil Co.* v. *U. S.*, 283 U. S. 235, 51 S. Ct. 429 (1931) and *Piedmont & Northern Ry.* v. *U. S.*, 280 U. S. 469, 50 S. Ct. 192 (1930), has been carved away somewhat, though to what extent is not clear.

See: *U. S.* v. *I. C. C.*, 337 U. S. 426, 69 S. Ct. 1410 (1949);

But cf.: *Ashland Coal & Ice Co.* v. *U. S.*, 325 U. S. 240, 65 S. Ct. 1573 (1945).

More than a negative order is involved here where the attack on the order is the nominal basis for three judge jurisdiction on constitutional grounds, with relief being sought from a statute whose constitutionality is not attacked or alleged.

The District Court has also overlooked *Ex Parte Bransford*, 310 U. S. 354, 60 S. Ct. 947 (1940), where a distinction is made between the ground of unconstitutionality of a statute as applied, which requires a three judge court, and the ground of the unconstitutionality of the result obtained by use of a statute which is not attacked as unconstitutional. Atlantic Coast Line has done no more than attack as uncon-

stitutional the result of an administrative act, and has not attacked the statute as generally applied to petitions for discontinuance. This case also holds that a three judge court is not required unless the action complained of is directly attributable to the statute (or an order, a fortiori). Here the penalties and remedies as to which relief is sought are not called for by the order or authorized by it, but in truth and in fact are directly attributable only to the statute.

The decision of the District Court is in conflict with the holding in *Wilents, et al.* v. *Sovereign Camp,* 306 U. S. 373, 59 S. Ct. 709 (1939), wherein it is held that an injunction in a three judge case must be directed at State officers who are clothed with authority to enforce the challenged statute and have taken steps to enforce such statutes. In view of *Oklahoma Natural Gas Company,* supra, this would apply to the Commission's order, but no State official has taken any steps to enforce the order, which in fact calls for no enforcement.

II. The decision below is in conflict with *Beal et al.* v. *Missouri Pacific R. R. Corp.,* 312 U. S. 45, 61 S. Ct. 418 (1941), which case indicates that if only a single suit is contemplated for penalties, the Supreme Court could not say that any such irreparable injury is threatened as would justify staying prosecution of the criminal laws of the State and withdrawing the determination of the legal question involved from the State Courts whose appointed function it is to decide it. In the present case, Atlantic Coast Line has not alleged any possible multiplicity of suits nor has it adduced any evidence to that effect. In fact there has been no move on the part of any State officer to enforce the statute at all. The case also notes that even if an adverse decision were rendered in the State court causing large

penalties to be assessed against the railroad, such penalties might well be the consequence of violation of State law.

III. The decision below is contrary to numerous recent holdings of the Supreme Court concerning the desirability of Federal courts abstaining from exercising their jurisdiction on matters which are properly decided first by the courts of the State.

Shipman v. *Dupre,* 339 U. S. 323 (1950).

Railroad Commission of Texas v. *Pullman Co.,* 312 U. S. 496, 61 S. Ct. 643 (1941);

Burford v. *Sun Oil Co.* 319 U. S. 315, 63 S. Ct. 1098 (1943);

Chicago v. *Fieldcrest Dairies,* 316 U. S. 168, 62 S. Ct. 986 (1942);

A. F. L. v. *Watson,* 327 U. S. 582, 66 S. Ct. 761 (1946);

Township of Hillsboro v. *Cromwell,* 326 U. S. 620, 66 S. Ct. 445 (1948);

Stainback v. *No Hoek Ke Lok,* 336 U. S. 368, 69 S. Ct. 608 (1949).

The same thread runs through all of the above cases, that to avoid needless friction with state policies the Federal judiciary should exercise with a wise discretion giving due regard to the rightful independence of the State government and the smooth working of the Federal judiciary. Is this not especially so where the railway is in truth seeking to escape the impact of statutes the constitutionality of which it does not question, for as was pointed out by Mr. Justice Frankfurter in the *Pullman* case, supra, a decision by the State courts may avoid the necessity of a constitutional decision in the Federal courts, and a ruling by a Federal court may prove to be supplanted by a subsequent controlling decision of a State tribunal.

The District Court declined to abstain from exercise of jurisdiction on the ground that there were no questions of novel, ambiguous or undecided State law involved. But *Burford* v. *Sun Oil Co.*, supra, indicates that there is no such limitation, so long as there are "basic problems of State policy" involved, that problems of local law are to be left to local courts where each case may be handled as "one more item" in a continuous series of adjudgments. That this case is vital for the Alabama Public Service Commission and the Alabama Courts is made clear by the fact that this case is the third in a series of such cases filed in the same judicial district, and the parties hereto well know that cases already are being readied by other railroads who are trying to escape the process of adjustment of a complex situation through local courts and make of a three judge court a tribunal for appeal of administrative orders.

Respectfully submitted,

A. A. CARMICHAEL,
Attorney General;
WALLACE L. JOHNSON,
Assistant Attorney General,
Attorneys for Defendants

APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

Civil Action No. 693-N

ATLANTIC COAST LINE RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

ALABAMA PUBLIC SERVICE COMMISSION, GORDON PERSONS, its President, and Jimmy Hitchcock and C. C. (Jack) Owen, Associate Commissioners; and A. A. Carmichael, Attorney General of the State of Alabama, Defendants

This cause coming on to be heard before a duly constituted three judge district court and having been submitted by agreement of the parties for final decree upon the pleadings in the cause and upon the evidence offered herein, including a transcript of the testimony presented at the hearing before the defendant, Alabama Public Service Commission, for the reasons set forth in the findings of fact, conclusions of law and the opinion of the Court filed herein:

It is now ordered, adjudged and decreed this 23 day of August, 1950, as follows, viz:

(1) That the motion of the defendants to stay the call for a three judge court, the motion to stay the proceedings in this court, and the motion to dismiss the cause of action, be, and they are, hereby overruled and denied.

(2) That the order of the defendant, Alabama Public Service Commission, dated April 6, 1950, denying the petition of the plaintiff filed May 4, 1949, and as amended on June 21, 1949, requesting authority to discontinue the daily operation of passenger trains Nos. 122 and 123 between Birmingham, Alabama, and Manchester, Georgia, in so far as they are operated in the State of Alabama, and substitute in lieu thereof trains alternately in each direction, with train number 122 departing Manchester, Georgia,

on Mondays, Wednesdays, and Fridays; and train number 123 departing Birmingham, Alabama, on Tuesdays, Thursdays, and Saturdays; with no Sunday service, be, and the same is, hereby vacated and declared to be null, void, and of no effect.

(3) That the defendants, Alabama Public Service Commission, Gordon Persons, its President, Jimmy Hitchcock and C. C. (Jack) Owen, Associate Commissioners; and A. A. Carmichael, Attorney General of the State of Alabama, together with the successors in office of each of them, and their agents, servants and attorneys, be, and they are, hereby permanently enjoined from taking any steps or proceedings of any nature whatsoever against the plaintiff, its officers, agents or employees, to enforce the provisions of said order or to enforce any fines, forfeitures, penalties or other sanctions provided by Title 48, Code of Alabama, 1940, or any remedies against the plaintiff, its officers, agents or employees, on account of the failure to observe the provisions and requirements of said order by discontinuing the daily operation of plaintiff's passenger trains Nos. 122 and 123 between Birmingham, Alabama, and Manchester, Georgia, in so far as they are operated within the State of Alabama, and substitute in lieu thereof trains alternately in each direction, with train number 122 departing Manchester, Georgia, on Mondays, Wednesdays, and Fridays; and train number 123 departing Birmingham, Alabama, on Tuesdays, Thursdays, and Saturdays; with no Sunday service; and,

(4) That the costs of court incurred in this cause be and the same are hereby taxed against the defendants, for which execution may issue.

LEON MCCORD,
United States Circuit Judge.
C. B. KENNAMER,
United States District Judge.
JOHN MCDUFFIE,
United States District Judge.

Filed August 23, 1950. O. D. Street, Jr., Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

Civil Action No. 693-N

ATLANTIC COAST LINE RAILROAD COMPANY, a Corporation, Plaintiff,

vs.

ALABAMA PUBLIC SERVICE COMMISSION, GORDON PERSONS, its President, and Jimmy Hitchcock and C. C. (Jack) Owen, Associate Commissioners; and A. A. Carmichael, Attorney General of the State of Alabama, Defendants

Before Leon McCord, Circuit Judge, and John McDuffie and Charles B. Kennamer, District Judges

Kennamer, District Judge:

Statement of the Case

This case, similar in facts and presenting the same points of law as the two cases previously decided by this court (Southern Railway Company, a corporation vs. Alabama Public Service Commission, et al., 88 Fed. Supp. 441, and Civil Action #681-N, to be reported in Fed. Supp.), is brought by the plaintiff, a foreign corporation, for injunctive relief against the defendants from proceeding to enforce sanctions provided under the laws of the State of Alabama for the failure or refusal of plaintiff to continue the daily operation of local passenger trains 122 and 123 between Birmingham, Alabama, and the Alabama-Georgia State Line, in violation of an order of the defendant Commission; and that said order be declared unlawful, null, void and of no effect.

This court, at the outset of the hearing, announced that the motions filed by the defendants: (a) to stay the call for a three judge court, (b) to stay the proceedings in this court, and (c) to dismiss the cause of action, would be overruled and denied without further argument, the court having

heard counsel on two previous occasions on these motions and therefore would continue to adhere to the rulings previously made.

By stipulation of the parties, the court heard the case on both the application for a temporary and permanent injunction.

Proceeding to the merits of the case, the court took evidence and heard counsel for the respective parties, and, in view of the comprehensive findings, conclusions of law, and opinions rendered in the two previous cases, makes the following concise findings in this case:

Findings of Fact

1. Plaintiff, a foreign corporation, operates passenger trains 122 and 123 daily between Birmingham, Alabama, and Manchester, Georgia, at a financial loss of between $12,000 and $16,000 per month, due to the lack of patronage occasioned by improvement in highways and highway facilities such as buses, automobiles, and trucks, which compete with and service the same territory as plaintiff's trains 122 and 123.

2. The defendant Alabama Public Service Commission, created by the State of Alabama, is empowered with authority to regulate public utilities such as the Plaintiff Railway, and where public necessity and convenience warrants such, may, in its discretion, require the plaintiff to continue daily operation of such Short Line runs as this one between Birmingham and the Alabama-Georgia State Line, without regard to the pecuniary loss which may be encountered by the railway company.

3. The plaintiff, as required by State law, petitioned the defendant Commission for authority to discontinue the daily operation of passenger trains 122 and 123, due to the continued heavy financial loss occasioned by the daily operation of these two trains, losses which indicate that such daily service is not substantially used or needed by the public, and substitute in lieu thereof trains alternately in each direction, with train number 122 departing Manchester, Georgia, on Mondays, Wednesdays, and Fridays; and train number 123 departing Birmingham, Alabama, on Tuesdays,

Thursdays, and Saturdays; with no Sunday service. This petition, as in the two previous cases before this court, was, after an unwarranted delay, heard by a subordinate employee of the Commission and then, after further undue delay, denied by the Commission.

4. An application to the Georgia Public Service Commission, by plaintiff, for authority to discontinue daily operation of trains 122 and 123 between Manchester, Georgia, and the Alabama-Georgia State Line, and in lieu thereof to operate the trains alternately in each direction as above set forth, was granted by the Georgia Public Service Commission on November 15, 1949, subject to the plaintiff obtaining authority from the Alabama Public Service Commission to make similar changes on these trains over that portion of its line located between the Alabama-Georgia State Line and Birmingham, Alabama.

5. There is no evidence before this court, and there was none before the Commission, to substantiate a finding of necessity on the part of the public for the continued daily operation of trains 122 and 123, and in the absence of such public necessity, coupled with the great financial loss which the plaintiff is suffering by reason of the continued daily operation of these trains, the order of the Commission denying plaintiff's application for authority to discontinue the daily operation of these trains and substitute in lieu thereof these alternate operations, which order, in effect, is a command by the State that plaintiff continue to furnish the train services involved or suffer the consequences of their abandonment, is confiscatory in its effect and the injunctive relief prayed for should be granted.

6. A majority of the communities served by trains 122 and 123 are either on or adjacent to improved highways and are served by bus line and motor express companies, in addition to the large percentage of individually owned automobiles.

7. The deficits occasioned by the operation of Short Line passenger trains such as trains 122 and 123 must be made up, if at all, by rate increases on freight services and is, therefore, a financial burden on freight customers.

8. The proposed alternate operation by plaintiff of trains 122 and 123 will provide reasonable and adequate facilities for the accommodation and convenience of the traveling public and of the communities through which these trains run, and when considered along with the heavy financial loss the plaintiff has sustained for over two years and is sustaining at the present, on account of the daily operation of these trains and the failure of the public to patronize such service to any substantial extent, any requirement on the part of the Commission that the plaintiff continue the daily operation of these trains is a denial of constitutional rights.

Conclusions of Law & Opinion

This court herein adopts as the Conclusions of law and opinion in this case the conclusions of law and opinions in the two previous cases which were recently before this court. (Southern Railway Co., vs. Ala. Public Service Commission, et al., 88 Fed. Supp. 441, and Civil Action 681-N, to be reported in Fed. Supp.).

LEON MCCORD,
U. S. Circuit Judge.
C. B. KENNAMER,
U. S. District Judge.
JOHN MCDUFFIE,
U. S. District Judge.

Filed Aug. 23, 1950. O. D. Street, Jr., Clerk.

APPENDIX "B"

Alabama Statutes

Code of Alabama 1940, Title 48:

Sec. 35. Abandonment of service, regulated;—No utility shall abandon all or any portion of its service to the public except ordinary discontinuance of service for nonpayment of charges, nonuser and similar reasons in the usual course

of business, unless and until written application is first made to the commission for the issuance of a certificate that the present or future public convenience or necessity permits such abandonment, and the issuance of such a certificate. Upon the filing of such application and after a hearing of all parties interested, the commission may, or may not, in its discretion, issue such certificate.

Sec. 50. Attorney General to represent commission; special counsel provided for;—The attorney general shall represent the public service commission in any and all legal proceedings which it may have the power to institute and which, pursuant to such power, it has instituted, and in all legal proceedings against it, and shall institute such legal proceedings which the commission may request or deem necessary, provided it has the power to institute them, to enforce the provisions of this title or compel obedience to and observance of the same by any person, firm, company, or corporation, upon which such obedience or observance is imposed. The attorney general with the approval of the governor may employ any special counsel to institute or defend such legal proceedings or to assist the attorney general therein, and to contract with the special counsel concerning a reasonable compensation for his or their services, which compensation shall be paid out of the treasury on a warrant drawn by the comptroller on the treasury upon approval by the governor. (1907, p. 43.)

Sec. 76. Rehearings;—Any time after an order has been made by the commission, any person interested therein may apply for a rehearing in respect to any matter determined therein, and the commission shall grant and hold such rehearing within sixty days after the said application therefor has been filed, and such rehearing shall be subject to such rules as the commission may prescribe. Application for such rehearing shall not excuse any utility or person from complying with or obeying an order of the commission, or operate in any manner to stay or postpone the enforcement thereof except as the commission may by order direct. Any order of the commission made after such rehearing shall have the same force and effect as an original order, but shall not affect any right, or the enforcement of

any right, arising from or by virtue of compliance with the original order prior to the order made after rehearing.

Sec. 78. Courts may compel compliance with orders of commission and punish failure;—In case of failure or refusal on the part of any person to comply with any valid order of the commission or of any commissioner, or any subpoena, or on the refusal of any witness to testify or answer as to any matter regarding which he may be lawfully interrogated, any circuit court in this state, or any judge thereof, on application of a commissioner, may issue an attachment for such person and compel him to comply with such order, or to attend before the commission and produce such documents and give his testimony upon such matters as may be lawfully required, and the Court or judge shall have power to punish for contempt as in cases of disobedience of a like order or subpoena issued by or from such court, or a refusal to testify therein.

Sec. 79. Appeals from orders of commission.—From any final action or order of the commission in the exercise of the jurisdiction, power, and authority conferred upon it by this title, an appeal therefrom shall lie to the circuit court of Montgomery County, sitting in equity, except appeals under chapter three of this title, and thence to the supreme court of Alabama. All appeals shall be taken within thirty days from the date of such action or order and shall be granted as a matter of right and be deemed perfected by filing with public service commission a bond for security of cost of said appeal when the appellant is a utility or person, and by filing notice of an appeal when the appellant is the State of Alabama. (1909, p. 96; 1932, Ex. Sess., p. 233.)

Sec. 81. Right to supersede order.—On any such appeal any utility, interested party, or intervenor may supersede any decree rendered by giving such supersedeas bond or bonds as may be appropriate to the proceedings as provided for herein for superseding an order or orders of the commission.

Sec. 82. Proceedings on appeal.—The commission's order shall be taken as prima facie just and reasonable. No new or additional evidence may be introduced in the circuit court except as to fraud or misconduct of some person en-

gaged in the administration of this title and affecting the order, ruling or award appealed from, but the court shall otherwise hear the case upon the certified record and shall set aside the order if the court finds that: the commission erred to the prejudice of appellant's substantial rights in its application of the law; or, the order, decision or award was procured by fraud or was based upon findings of facts contrary to the substantial weight of the evidence. Provided, however, the court may, instead of setting aside the order, remand the case to the commission for further proceedings in conformity with the direction of the court. The court may, in advance of judgment and upon a sufficient showing, remand the cause to the commission for the purpose of taking additional testimony or other proceedings. (1932, Ex. Sess., p. 233.)

Sec. 84. Appeal does not supersede order;—supersedeas bond.—No appeal shall stay or supersede the order or action appealed from unless the appellate court or judge thereof, upon hearing and notice, after consideration of the testimony, taken before the commission, shall so direct. If the appeal be from an order of the commission reducing or refusing to increase such rates, fares, charges, or any of them, or any schedule, or part or parts of any schedule of such rates, fares or charges, the appellate court or judge thereof, shall not so direct or order a supersedeas or stay of the action or order appealed from without requiring as a condition precedent to the granting of said supersedeas that the utility applying for the same shall execute and file with the clerk of said court a bond, which bond shall be as hereinafter provided.

Sec. 106. Permit to abandon service.—No transportation company subject to this chapter shall abandon all or any portion of its service to the public or the operation of any of its lines, properties, or plant which would affect the service it is rendering the public, except ordinary discontinuances of service for nonpayment of charges, nonuser, violations of rules and regulations or similar reasons in the usual course of business, unless and until there shall first have been filed an application for a permit to abandon service and

obtained from the commission a permit allowing such abandonment.

Sec. 399. Penalty for charging excessive rates, granting rebates, or violating commission's order, etc.—Any utility doing business in this state, or any of its authorized agents, officers or employees, who is guilty of knowingly or willfully charging, demanding, or receiving any rate or charge for any commodity or service different from that authorized by its lawful tariffs on file with the Alabama public service commission, or who is guilty of knowingly or willfully granting or giving to any person or persons any concession or rebate in respect of its lawful charges or rates, or who knowingly or willfully violates, or procures, aids or abets a violation of, any lawful order or decree of said commission, shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than one thousand dollars for each offense. In the case of a violation of said commission's orders or decrees, each day's violation shall be deemed a separate offense. (Ib.; 1932, Ex. Sess., p. 209.)

Section 400. Violations of statutes as to reasonable rates, adequate service and unjust discriminations; penalty.—Every officer, agent or employee of such common carrier or railroad corporation who shall violate or procure, aid or abet any violation by such common carrier, or railroad corporation, or any of the statutes of this state relating to reasonable rates, adequate service, and unjust discriminations of the public service of any common carrier of this state, or who shall fail to obey, observe, or comply with any order of the public service commission, or any provisions of any order of said commission, or who procures, aids or abets any such common carrier, or corporation, in its failure to obey, observe, and comply with any such order, direction, or provision relating to reasonable rates, adequate service and unjust discrimination by common carriers of this state, shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not exceeding one thousand dollars, to be fixed by the court. (1907, p. 23.)

United States Statutes

United States Code, Title 28:

Sec. 1253. Direct appeals from decisions of three-judge courts.

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Sec. 2101. Supreme Court; time for appeal or certiorari; docketing; stay.

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been

rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay. As amended May 24, 1949, c. 1939, Sec. 106, 63 Stat. 104.

Sec. 2281. Injunction against enforcement of State statute; three judge court required.

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under Section 2284 of this title.

Sec. 2284. Three-judge district court; composition; procedure.

In any action or proceeding required by an Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall

designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the state.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail by the clerk, and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made, may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or re-

strain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State.

(2231)

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IN THE UNITED STATES DISTRICT COURT, FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

Civil Action No. 698-N .

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, A CORPORATION,

Plaintiff,

vs.

ALABAMA PUBLIC SERVICE COMMISSION, GORDON PERSONS, ITS PRESIDENT, AND JIMMY HITCHCOCK AND C. C. (JACK) OWEN, ASSOCIATE COMMISSIONERS, AND A. A. CARMICHAEL, ATTORNEY GENERAL OF THE STATE OF ALABAMA,

Defendants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, defendants-appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause.

Opinion Below

The opinion of the District Court for the Middle District of Alabama, Northern Division, is unreported. A copy of

the opinion, findings of fact, conclusions of law and judgment are attached hereto as Appendix A.

Jurisdiction

The judgment of the District Court was entered on October 31, 1950. A petition for appeal is presented to the District Court herewith, to wit, on December 29, 1950. The appeal herein is from the final decree made and entered by the District Court of the United States specially constituted under Title 28, Sections 2281 and 2284, United States Code, and, as provided in Section 1253, Title 28, United States Code, a direct appeal to the Supreme Court of the United States may be taken from the final decree made by such specially constituted District Court. It is further provided by Title 28, Section 2101(b), that such a direct appeal to the Supreme Court of the United States from such a final decree may be taken within sixty days.

Questions Presented

Where state statutes provide that a railroad may not abandon service unless it first obtains a certificate from the State Public Service Commission allowing such abandonment, and after hearing and consideration, the Commission declines to grant such certificate and the railway files a complaint asking an injunction of a three judge Federal Court.

a. Does a three judge Federal court have jurisdiction of such suit if the railway has made no attack on the constitutionality of the statutes which require that the trains continue operation, but only on the constitutionality of the order which denied the certificate to abandon?

b. Does a three judge Federal court have jurisdiction of such suit if only the constitutionality of the order is attacked, but relief sought in an injunction

enjoining the Public Service Commission and other State officers from enforcing any penalties or remedies provided under State law, which penalties or remedies are not called for by the order or authorized by it?

c. Assuming *arguendo* that there is jurisdiction for a three judge Federal court, should the court abstain from exercising it to enjoin enforcement of State criminal laws where there has been no threat of imminent enforcement of criminal sanctions, no allegation of possible multiplicity of suits, and where any criminal penalties which might be assessed would be only a consequence of violation of the State law?

d. Assuming *arguendo* that there is a jurisdiction for a three judge Federal court, should the court abstain from exercising its jurisdiction in recognition of the wisdom of allowing State courts to try questions of local State policy relating to complicated questions of fact?

Statutes Involved

Code of Alabama 1940, Title 48, Sections 35, 50, 76, 78, 79, 81, 82, 84, 106, 399 and 400; United States Code, Title 28, Sections 1253, 2101(b), 2281 and 2284. The said statutes are set out verbatim or pertinent parts thereof are appropriately summarized in Appendix B hereto.

Statement

Appellee, hereinafter referred to as L & N Railroad, has operated trains between Georgiana, Alabama, and Graceville, Florida, as a part of its railroad system. On November 6, 1947, L & W Railroad petitioned the Alabama Public Service Commission to allow it to discontinue the operation of passenger trains Nos. 27 and 28 between the above cities, pursuant to the requirements of Code of Alabama 1940, Title 48, Sections 35 and 106, which require that no transportation company shall abandon any of its service to the public unless it first shall have filed an application for permit to abandon service and obtained from

the Commission a permit allowing such abandonment. Hearings were held on August 19, 1948 and January 11, 1950, and on July 28, 1950, the Commission entered an order denying L & N Railroad's application for authority to abandon.

L & N Railroad did not ask for a rehearing under Code of Alabama 1940, Title 48, Section 76, nor did it take an appeal from the Commission's order, even though Code of Alabama 1940, Title 48, Section 79, provides for an appeal from any final action or order of the Public Service Commission to the Circuit Court of Montgomery County, Alabama, in Equity, and thence to the Supreme Court of Alabama. Sections 81 and 84 of Title 48 provide that on any such appeal the order or action appealed from may be stayed or superseded by the State Appellate Court, or the Judge thereof, upon hearing after consideration of the testimony taken before the Commission, and, except in rate cases, not here involved, such supersedeas may be ordered by the said Court or judge without the requirement of a supersedeas bond. Section 82 of Title 48 provides that the Appellate Court shall hear the case upon the certified record and shall set aside the order of the Commission if the Court finds that the Commission erred to the prejudice of appellant's substantial rights in its application of the law, or that the order was based upon a finding of facts contrary to the substantial weight of the evidence.

Instead, L & N Railroad filed its complaint in the United States District Court for the Middle District of Alabama, basing jurisdiction upon alleged Federal questions involved, and upon diversity of citizenship, and asked for convocation of a district court of three judges and a hearing under the provisions of United States Code, Title 28, Section 2284. The L & N Railroad alleged that the revenue received from operation of trains Nos. 27 and 28 was dis-

proportionate to expenses and that the continuation of such trains was not required by public convenience and necessity. There were allegations that the Commission's order deprived L & N Railroad of its property without due process, that it was being denied equal protection of the law, that interstate commerce was being burdened and that the order was unjust and confiscatory.

The L & N Railroad has not in its pleadings, or at the trial, made an attack upon the constitutionality of any state statute of the State of Alabama. The only attack on constitutional grounds was directed at the Commission's order of July 28, 1950.

Appellants first filed with Honorable Charles B. Kennamer, Judge of the United States District Court for the Middle District of Alabama, a petition directed to him individually, asking that he stay the call for a three judge Federal court. No formal order was issued by Judge Kennamer, but this motion was ruled upon by the three judge court after it convened, along with other motions. Thereafter, appellants filed a motion to dismiss, a motion to stay and an answer. After oral argument on October 20, 1950, all of appellant's motions were overruled and it was then stipulated by counsel for the parties that evidence should be taken and the case submitted on L & N's prayer for a permanent injunction. Thereafter, on October 31, 1950, the Court issued its final judgment and decree overruling all of appellants' motions, declaring the Commission's order of July 28, 1950, to be null and void, and enjoining the appellants, their successors in office and their agents, servants and attorneys from taking any steps or proceedings of any nature whatsoever against the L & N Railroad to enforce the order of July 28, 1950, or to enforce any fine, forfeitures, penalties or other sanctions provided by Title 48, Code of Alabama 1940, or any remedies against

the plaintiff, its officers, agents or employees on account of the failure to observe the provisions and requirements of said order by discontinuing the operation of plaintiff's passenger trains 27 and 28 between Georgiana, Alabama, and Graceville, Florida, insofar as they are operated within the State of Alabama.

The Questions Are Substantial

The questions involved in this appeal are similar to those raised in several recent cases before this Court, among them being:

Railroad Commission of Texas v. *Pullman Co.*, 312 U. S. 496; 61 S. Ct. 643 (1941).

Burford v. *Sun Oil Co.*, 319 U. S. 315, 63 S. Ct. 1098 (1943).

Beal et al. v. *Missouri Pac. R. R. Corp.*, 312 U. S. 45, 61 S. Ct. 418 (1941).

Ex parte Bransford, 310 U. S. 354, 60 S. Ct. 947 (1940).

There are involved the same fundamental issues of how far the Federal judiciary has jurisdiction over local questions which can be adjudicated by State courts, and to what extent Federal courts should exercise jurisdiction which they do have over such questions where there is ample provision for judicial determination within the framework of state courts. The decision of the three judge District Court in finding that it had jurisdiction is in direct conflict with the language of the statute under which it was convened, and even had there been jurisdiction the decision is contrary to the clear policy set out in numerous recent decisions of the Supreme Court that Federal courts will stay their hand on local matters until the state courts have ruled.

I. As appellants read Title 28, United States Code, Section 2281, three requirements must be met before there is jurisdiction for a special three judge Federal court.

a. An interlocutory or permanent injunction must be sought.

b. The injunction must be sought on the ground that a state statute is unconstitutional. (*Oklahoma Natural Gas Company* v. *Russell,* 281 U. S. 290, 43 S. Ct. 353 (1923) interprets "statute" as including "order.")

c. The injunction must seek restraint of enforcement, operation or execution of the statute or order whose constitutionality is attacked. Appellants submit that there can be real question of this in view of the specific language of the statute:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any state statute (including 'order' since the *Oklahoma* case) . . . shall not be granted . . . upon the ground of the unconstitutionality of *such* statute (including 'order' since the *Oklahoma* case)."

L & N Railroad's complaint failed to meet requirements "b" and "c" as to any Alabama statute. No attack was made on the constitutionality of any of the statutes or laws of the State of Alabama and it has not asked for an adjudication of constitutionality of any statute of the State of Alabama. The prayer for relief includes statutes in the requested cloak of protection, for it refers to "forum proceeding against the plaintiff, its officers, agents or employees, to enforce any penalties or other remedies provided under the laws of the State of Alabama on account of plaintiffs or their failure to continue the operation of said two local passenger trains." However, the statutes included are neither identified nor their constitutionality attacked.

As to the Commission's order of July 28, 1950, it is squarely charged to be unconstitutional, but the complaint did not ask relief in terms of the order but went far beyond that and sought an injunction against all possible penalties and remedies under Alabama law, a much broader field of relief than the language of Section 2281 allows,—injunction against "enforcement, operation or execution" of "such statute or such order." L & N Railroad's prayer and the Court's decree would include even common law remedies, which is a broad extension of Section 2281. And the Alabama Supreme Court has held that orders of the Commission may be enforced by the courts by issuance of writs of mandamus.

Alabama Public Service Commission v. *Western Union Telegraph Co.*, 208 Ala. 243, 94 So. 472 (1922).

L & N Railroad has sought to create a new field for Federal jurisdiction by using allegations of unconstitutionality of an order as a springboard to get into court while seeking relief from a constitutional statute, and from any and all forms of redress to which it might be subject whenever it wishes to violate the laws of the State.

The theory of the District Court seemed to be that it could enjoin whatever penalties and remedies, statutory or common law, as it saw fit in order to give effective relief as a duly convened court of equity. But this is "bootstrap law," since jurisdiction is conferred initially only if relief is sought from the statute (or order) whose constitutionality is questioned. The three judge court cannot, by the broad scope of its relief confer jurisdiction upon itself retrospectively, if the complaint averred no case quickening the special jurisdiction of the statutory-created court. The three judge court is of statutory creation and its jurisdic-

tion is to be strictly limited by the statute which created it, and is not to be lightly extended.

Okla. Gas & Elec. Co. v. *Okla. Packing Co.*, 292 U.S. 386, 34 S. Ct. 732 (1934).

Phillips v. *U. S.*, 312 U. S. 246, 61 S. Ct. 480 (1941).

Too, it is noteworthy that the extraordinary relief obtained, going far beyond the relief against "such statute" (N. B., or "order") authorized by Section 2281, is exactly the relief prayed for by the L & N Railroad from the very beginning, and the complaint was challenged by appellants on jurisdictional grounds before the three judges ever convened (by motion directed to Judge Charles B. Kennamer individually) and challenged again after the three judge court convened but before any evidence was taken and before the court ruled that it had jurisdiction to proceed. This is no special case of equity giving extraordinary relief where it cannot give that asked out of equity giving the relief prayed for.

The "negative order" doctrine of *Standard Oil Co.* v. *U. S.*, 283 U. S. 235, 51 S. Ct. 429 (1931) and *Piedmont & Northern Ry.* v. *U. S.*, 280 U. S. 469, 50 S. Ct. 192 (1930), has been carved away somewhat, though to what extent is not clear.

See: *U. S.* v. *I. C. C.*, 337 U. S. 426, 69 S. Ct. 1410 (1949);

But cf.: *Ashland Coal & Ice Co.* v. *U. S.*, 325 U. S. 240, 65 S. Ct. 1573 (1945).

More than a negative order is involved here where the attack on the order is the nominal basis for three judge jurisdiction on constitutional grounds, with relief being sought from a statute whose constitutionality is not attacked or alleged.

The District Court has also overlooked *Ex Parte Bransford,* 310 U. S. 354, 60 S. Ct. 947 (1940), where a distinction is made between the ground of unconstitutionality of a statute as applied, which requires a three judge court, and the ground of the unconstitutionality of the result obtained by use of a statute which is not attacked as unconstitutional. The L & N Railroad has done no more than attack as unconstitutional the result of an administrative act, and has not attacked the statute as generally applied to petitions for discontinuance. This case also holds that a three judge court is not required unless the action complained of is directly attributable to the statute (or an order, a fortiori). Here the penalties and remedies as to which relief is sought are not called for by the order or authorized by it, but in truth and in fact are directly attributable only to the statute.

The decision of the District Court is in conflict with the holding in *Wilentz, et al.* v. *Sovereign Camp,* 306 U. S. 373, 59 S. Ct. 709 (1939), wherein it is held that an injunction in a three judge case must be directed at State officers who are clothed with authority to enforce the challenged statute and have taken steps to enforce such statutes. In view of *Oklahoma Natural Gas Company, supra,* this would apply to the Commission's order, but no State official has taken any steps to enforce the order, which in fact calls for no enforcement.

II. The decision below is in conflict with *Beal, et al.* v. *Missouri Pacific R. R. Corp.,* 312 U. S. 45, 61 S. Ct. 418 (1941), which case indicates that if only a single suit is contemplated for penalties, the Supreme Court could not say that any such irreparable injury is threatened as would justify staying prosecution of the criminal laws of the State and withdrawing the determination of the legal question involved from the State courts whose appointed

function it is to decide it. In the present case, the L & N Railroad has not alleged any possible multiplicity of suits nor has it adduced any evidence to that effect. In fact, there has been no move on the part of any State officer to enforce the statute at all. The case also notes that even if an adverse decision were rendered in the State court causing large penalties to be assessed against the railroad, such penalties might well be the consequence of violation of State law.

III. The decision below is contrary to numerous recent holdings of the Supreme Court concerning the desirability of Federal courts abstaining from exercising their jurisdiction on matters which are properly decided first by the courts of the State.

Shipman v. *Dupre,* 339 U. S. 323 (1950)

Railroad Commission of Texas v. *Pullman Co.,* 319 U. S. 315, 61 S. Ct. 643 (1941)

Burford v. *Sun Oil Co.,* 319 U. S. 315, 63 S. Ct. 1098 (1943)

Chicago v. *Fieldcrest Dairies,* 316 U. S. 168, 62 S. Ct. 986 (1942)

A.F.L. v. *Watson,* 327 U. S. 582, 66 S. Ct. 761 (1946)

Township of Hillsboro v. *Cromwell,* 326 U. S. 620, 66 S. Ct. 445 (1948)

Stainback v. *Mo Hock Ke Lok,* 336 U. S. 368, 69 S. Ct. 608 (1949)

The same thread runs through all of the above cases, that to avoid needless friction with state policies the Federal judiciary should exercise a wise discretion, giving due regard to the rightful independence of the state government and the smooth working of the Federal judiciary. Is this not especially so where the railway is in truth seeking to escape the impact of statutes the constitutionality of which

it does not question, for as was pointed out by Mr. Justice Frankfurter in the *Pullman* case, *supra*, a decision by the State courts may avoid the necessity of a constitutional decision in the Federal courts, and a ruling by a Federal court may prove to be supplanted by a subsequent controlling decision of a state tribunal.

The District Court declined to abstain from exercise of jurisdiction on the ground that there were no questions of novel, ambiguous or undecided state law involved. But *Burford* v. *Sun Oil Co., supra,* indicates that there is no such limitation, so long as there are "basic problems of State policy" involved, that problems of local law are to be left to local courts where each case may be handled as "one more item" in a continuous series of adjudgments. That this case is vital for the Alabama Public Service Commission and the Alabama courts is made clear by the fact that this case is the fourth in a series of such cases filed in the same judicial district, and the parties hereto well know that cases already are being readied by other railroads who are trying to escape the process of adjustment of a complex situation through local courts and make of a three judge court a tribunal for appeal of administrative orders.

Respectfully submitted,

A. A. Carmichael
Attorney General
Wallace L. Johnson,
Assistant Attorney General
Attorneys for Defendants

APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 698-N

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, a Corporation, *Petitioner,*

vs.

ALABAMA PUBLIC SERVICE COMMISSION, GORDON PERSONS, Its President, and JIMMY HITCHCOCK and C. C. (JACK) OWEN Associate Commissioners, and A. A. CARMICHAEL, Attorney General of the State of Alabama, *Defendants*

This cause coming on to be heard before a duly constituted three judge district court and having been submitted by agreement of the parties for final decree upon the pleading in the cause and upon the evidence offered herein, including a transcript of the testimony presented at the hearing before the defendant, Alabama Public Service Commission, for the reasons set forth in the findings of fact, conclusions of law and the opinion of the Court filed herein:

It is now ordered, adjudged and decreed this 31st day of October, 1950, as follows, viz:

(1) That the motion of the defendants to stay the call for a three judge court, the motion to stay the proceedings in this court, and the motion to dismiss the cause of action, be, and they are, hereby overruled and denied.

(2) That the order of the defendant, Alabama Public Service Commission, dated July 28, 1950, denying the petition of the plaintiff filed November 6, 1947, requesting authority to discontinue the daily operation of passenger trains Nos. 27 and 28 between Georgiana, Alabama, and Graceville, Florida, in so far as they are operated in the State of Alabama, be, and the same is, hereby vacated and declared to be null, void, and of no effect.

(3) That the defendants, Alabama Public Service Commission, Gordon Persons, its President, Jimmy Hitchcock and C. C. (Jack) Owen, Associate Commissioners; and A. A. Carmichael, Attorney General of the State of Alabama, together with the successors in office of each of them, and their agents, servants and attorneys, be, and they are, hereby permanently enjoined from taking any steps or proceedings of any nature whatsoever against the plaintiff, its officers, agents or employees, to enforce the provisions of said order or to enforce any fines, forfeitures, penalties or other sanctions provided by Title 48, Code of Alabama, 1940, or any remedies against the plaintiff, its officers, agents or employees, on account of the failure to observe the provisions and requirements of said order by discontinuing the daily operation of plaintiff's passenger trains Nos. 27 and 28 between Georgiana, Alabama, and Graceville, Florida, in so far as they are operated within the State of Alabama; and,

(4) That the costs of court incurred in this cause be and the same are hereby taxed against the defendants, for which execution may issue.

LEON MCCORD,
United States Circuit Judge.
CHARLES B. KENNAMER,
United States District Judge.
SIDNEY C. MIZE,
United States District Judge.

Filed Oct. 31, 1950. O. D. Street, Jr., Clerk. By Annie Schoolar, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action #698–N

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, a Corporation, *Petitioner*,

vs.

ALABAMA PUBLIC SERVICE COMMISSION, GORDON PERSONS, its President, and JIMMY HITCHCOCK AND C. C. (JACK) OWEN, Associate Commissioners; and A. A. CARMICHAEL, Attorney General of the State of Alabama, *Defendants*

Before Leon McCord, Circuit Judge, and Charles B. Kennamer and Sidney C. Mize, District Judges

KENNAMER, *District Judge:*

Statement of the Case

This is the fourth in a series of cases recently before this court involving similar facts and presenting the same points of law. (Southern Railway Company, a corporation vs. Alabama Public Service Commission, et al., 88 Fed. Supp. 441; Southern Railway Company, a corporation, vs. Alabama Public Service Commission, et al., 91 Fed. Supp. 980; and Atlantic Coast Line Railroad Company, a corporation, vs. Alabama Public Service Commission, et al., 92 Fed. Supp. 579).

Plaintiff, a citizen of the State of Kentucky, petitions this court for injunctive relief against the defendants from proceeding to enforce sanctions provided under the laws of the State of Alabama for failure or refusal of plaintiff to continue the daily, except Sunday, operation of local passenger trains Numbers 27 and 28 between Georgiana, Alabama, and the Alabama-Florida State Line, in violation of an order of the defendant Commission; and that said order be declared unlawful, null, and void and of no effect.

This court, at the outset of the hearing, announced that the motions filed by the defendants: (a) to stay the call for

a three judge court, (b) to stay the proceedings in this court, and (c) to dismiss the cause of action, would be overruled and denied without further argument unless counsel for the defendants desired to cite any later decisions to the court, which counsel stated they were unable to do; therefore, the court continues to adhere to the rulings previously made, and reaffirms the following principles of law:

As the bill challenges the validity under the Federal Constitution of an order of an administrative board of the State, acting under a State statute upon which no attack is made as to the validity of the statute itself, and praying for injunctive relief against the enforcement, operation or execution of such order, a District Court, composed of three judges, under Title 28, Section 2284, has jurisdiction.

Harkness v. Irion, 278 U. S. 92.
Oklahoma Gas Co. v. Russell, 261 U. S. 290.

Plaintiff has exhausted all administrative remedies, and the administrative processes having been terminated, plaintiff has a choice of forums, it could have prosecuted an appeal to the circuit court of Montgomery County, Alabama, (Title 48, Section 79, Code of Alabama, 1940) or it could have invoked the jurisdiction of this court in a plenary suit.

Avery Freight Lines, Inc. v. Persons, 250 Ala. 40.
St. Louis-San Francisco RR v. Ala. Pub. Ser. Comm. 279 U. S. 560. Railway Warehouse Comm. v. Duluth St. Ry. Co. 273 U. S. 625.

Since no suit is pending at this time in any of the courts of the State of Alabama between the parties to, or involving the subject matter of, this litigation, the rules of comity are inapplicable.

Sou. Railway Co. v. Ala. Pub. Ser. Comm.
88 Fed. Supp. 441.
91 Fed. Supp. 980.

The doctrine of discretionary abstention does not here apply. There is no ambiguous, novel or undecided State law involved herein. The authority of the Commission to

issue the order is not questioned. The statute under which it acted is not attacked. The Alabama Law requires no definitive construction or authoritative interpretation.

Sou. Railway Co. v. Ala. Pub. Serv. Comm.
91 Fed. Supp. 980.

By stipulation of the parties, the court heard the case on both the application for a temporary and permanent injunction.

Proceeding to the merits of the case, the court took evidence and heard counsel for the respective parties, and now makes the following findings of fact and conclusions of law.

Findings of Fact

1. Plaintiff, a corporation organized and existing under the laws of the State of Kentucky, is engaged as a common carrier by railroad of persons and property in intrastate commerce between points within the State of Alabama on the one hand, and in interstate commerce between points within the State of Alabama and points in other states on the other hand, and as such common carrier is subject to the jurisdiction of the Alabama Public Service Commission and the Interstate Commerce Commission, respectively.

2. The defendant Alabama Public Service Commission, consisting of a President and two Associate Commissioners, is a Commission created under the laws of the State of Alabama (Title 48, Section 1, Code of Alabama, 1940) and authorized under the laws of the State of Alabama to exercise certain regulatory powers over the plaintiff and other common carriers by railroad (Title 48, Section 106, Code of Alabama, 1940). The principal office and official domicile of said Commission and each of its Commissioners is located in the City and County of Montgomery, and within the middle district of Alabama. The defendant A. A. Carmichael is Attorney General of the State of Alabama, with his official office in, and residing in, the City and County of Montgomery, and is by the statutes and laws of the State of Alabama charged with the supervision and control of legal proceedings in behalf of the State of Alabama, and

is attorney for the Alabama Public Service Commission (Title 48, Sections 50, 51, Code of Alabama, 1940).

3. This is a suit of a civil nature between citizens of different states, and exceeds, exclusive of interest and costs, the sum of three thousand dollars, and arises under the 14th Amendment to the Constitution of the United States.

4. The plaintiff, as required by Alabama Law (Title 48, Section 35 and 106, Code of Alabama, 1940), petitioned the defendant Commission for authority to discontinue the daily operation of passenger trains numbers 27 and 28 between Georgiana, Alabama, and the Alabama-Florida State Line, due to the continued heavy financial loss occasioned by the daily operation of these two trains, losses which indicate that such daily service is not substantially used or needed by the public.

5. Plaintiff's petition to discontinue the operation of trains 27 and 28 was filed with the Alabama Public Service Commission on November 6, 1947. This petition, as in the previous cases before this court, was, after an unwarranted, unreasonable and unexplained delay, heard by the Commission at a final hearing begun on January 11, 1950, and disposed of by the Commission denying the petition in an order dated July 28, 1950.

6. Plaintiff seeks a temporary and permanent injunction against the defendants, separately and severally, from proceeding to enforce sanctions provided under the laws of the State of Alabama for the failure or refusal of plaintiff to continue the operation of local passenger trains Nos. 27 and 28, within the State of Alabama, in violation of order No. 11641, entered by the Commission July 28, 1950, and that said order be declared unlawful, null, void and of no effect.

7. In lieu of the present service by train, plaintiff proposes, if proper authority can be secured from the defendant commission, to substitute bus service between Georgiana, Alabama, and Graceville, Florida, over paved highway which runs practically parallel to the railroad tracks of the plaintiff between Georgiana, Alabama, and the Alabama-Florida State Line. Plaintiff proposes such service

either by arrangement with existing certified motor carriers of passengers, namely Capital Motor Lines and Alaga Coach Lines or, if necessary and proper authority can be secured under the Alabama Motor Carrier Act of 1939, to operate such bus service itself.

8. Plaintiff is not a common carrier of the United States Mail. The collection and delivery of all mail is the function of the United States Government, exclusively.

9. Plaintiff's trains Nos. 27 and 28 operate daily, except Sunday, between Georgiana, Alabama, and Graceville, Florida, carrying passengers, mail, and express; train No. 27 leaves Georgiana at 7:15 A.M., scheduled to arrive at Graceville at 10:40 A.M., and train No. 28 leaves Graceville at 11:05 A.M., and is scheduled to arrive at Georgiana at 2:35 P.M.

10. The approximate distance between Georgiana, Alabama and Graceville, Florida, is 86 miles. Train #27, leaving Georgiana, makes scheduled and flag stops at the following towns in Alabama: Rhodes, McKenzie, Shreve, Brooks, South, Red Level, River Falls, Cawthon, Andalusia, Sanford, Babbie, Poley, Opp, Estothel, Kinston, Lowery, Pera, Samson, Marl, Lytle, Geneva, Thurston, Black, and Highnote. Train #28 makes the same trip in reverse.

11. The counties through which trains 27 and 28 operate are predominantly rural and agricultural, and the Federal Census of 1950 shows a decrease in population in these counties since the Census of 1940.

12. The route of Capital Motor Lines parallels the track of the plaintiff served by trains 27 and 28 from McKenzie, Alabama, to Opp, Alabama, a distance of some 38 miles. At both Opp, Alabama, and Andalusia, Alabama, Capital Motor Lines connects with Alaga Coach Lines, and Alaga Coach Lines then parallels the plaintiff's track on into Geneva, Alabama, and the Alaga Coach Lines runs on into Dotham, Alabama, where it connects with other bus lines operating into Graceville, Florida.

13. Capital Motor Lines does not at present have a certificate to operate from McKenzie to Georgiana, Alabama, and return, but they stand ready and willing, if trains 27 and 28 are discontinued, and authority is granted them by

the defendant Commission, to operate such bus service. A complete and adequate bus service between Georgiana, Alabama and Graceville, Florida, on highway which parallels the tracks over which trains 27 and 28 operate, is now proposed by the Capital Motor Lines.

14. Plaintiff is now, and has for several years, operated trains 27 and 28 at a heavy financial loss. This operating deficit now amounts to around $188.00 per day.

15. Passenger travel on trains 27 and 28 is now, and has been for several years, at a very low ebb, there being times when the train crew exceeds the number of passengers on the train.

16. There is no evidence before this court, and there was none before the defendant Commission, to substantiate a finding of necessity on the part of the public for the continued daily operation of trains 27 and 28, and in the absence of such public necessity, coupled with the great financial loss which the plaintiff is suffering by reason of the continued operation of these trains, the order of the Commission denying plaintiff's application for authority to discontinue the operation of these trains is confiscatory in its effect and the injunctive relief prayed for should be granted.

17. The passenger transportation revolution, resulting from the construction of fine highways, which the railroads are taxed to help build and maintain, coupled with the convenience of the private automobile and buses, has outmoded local passenger trains Nos. 27 and 28, and caused them to become an undesirable and unused form of transportation.

18. Although negative in form, the order of the defendant Commission in denying plaintiff's petition for authority to discontinue the operation of trains 27 and 28 amounts to a command by the State that plaintiff continue to furnish the train service involveed or suffer the consequences of their abandonment. Plaintiff, in complying with the commission's order, continues to operate these trains at a serious and growing financial loss, and coupled with the absence of any necessity on the part of the public for the continued operation of these trains, the Commission's order

is affirmative in nature and is having the practical effect of confiscating plaintiff's property in violation of the 14th Amendment of the United States Constitution.

Conclusions of Law

1. Plaintiff's suit arises under the 14th Amendment to the United States Constitution and the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.

2. This court has jurisdiction of the parties and of the subject matter, and the parties are properly before the court.

3. The questions for decision present no unresolved question of State law.

4. Plaintiff is required by Alabama law to obtain a permit from the Alabama Public Service Commission before discontinuing regularly scheduled passenger trains.

5. Plaintiff is under no obligation to continue to offer a service which the public will not use, where the offer is a great financial burden, and where it is unreasonable to demand its continuance.

6. The controlling criteria in determining whether local passenger trains may be discontinued are these: the character and population of the territory served, the public patronage, or lack of it, the facilities remaining, the expense of operation as compared with revenue from same, and the operations of the carrier as a whole.

7. Plaintiff will suffer irreparable damage unless this court permanently enjoins defendants and their successors in office from seeking to impose the sanctions provided by Title 48, Code of Alabama, 1940, upon discontinuance by plaintiff of operation of its passenger trains Nos. 27 and 28 between Georgiana, Alabama and the Alabama-Florida State Line, in opposition to the order of the defendant Commission, Docket No. 11641, dated July 28, 1950.

8. Plaintiff has no adequate remedy at law.

9. The defendant's order No. 11641, dated July 28, 1950, denying plaintiff permission to discontinue trains 27 and 28, is unjust, unreasonable and confiscatory and deprives plaintiff of its property without just compensation in

violation of the 14th Amendment to the Constitution of the United States since there is no longer any public necessity for this service and plaintiff is operating at a large financial loss.

10. Plaintiff owes no common carrier obligations either to the United States or the General Public to transport the United States Mail.

11. An order by the defendant Commission which requires the Plaintiff to operate local passenger trains Nos. 27 and 28 under circumstances as herein set forth, confiscates Plaintiff's property in violation of the 14th Amendment to the United States Constitution even though Plaintiff, in the over-all operation of its Railway system, operates at a financial profit.

12. Plaintiff is entitled to the relief sought in the bill of complaint.

Opinion of the Court

When viewed in all the attendant circumstances and facts, this court is of the opinion that the defendant Commission did not act upon the evidence presented by the plaintiff in support of the petition to discontinue trains 27 and 28, but has adopted an arbitrary ruling that all such local passenger trains, irrespective of the financial loss and absence of public necessity for their continued operation, will be required to continue to operate.

However, irrespective of the attitude of the Commission or its method of operation, this court is not concerned as to the mere correctness of the method and reasoning adopted by the regulating agency, but whether the order of the Commission will result in confiscation, and that is what this court so finds.

LEON MCCORD,
United States Circuit Judge.
CHARLES B. KENNAMER,
United States District Judge.
SIDNEY C. MIZE,
United States District Judge.

Filed Oct. 31, 1950.

O. D. STREET, JR., *Clerk.*
By ANNIE SCHOOLAR, *Deputy Clerk.*

APPENDIX "B"

Alabama Statutes

Code of Alabama 1940, Title 48:

Sec. 35. Abandonment of service, regulated;—No utility shall abandon all or any portion of its service to the public except ordinary discontinuance of service for nonpayment of charges, nonuser and similar reasons in the usual course of business, unless and until written application is first made to the commission for the issuance of a certificate that the present or future public convenience or necessity permits such abandonment, and the issuance of such a certificate. Upon the filing of such application and after a hearing of all parties interested, the commission may, or may not, in its discretion, issue such certificate.

Sec. 50. Attorney General to represent commission; special counsel provided for;—The attorney general shall represent the public service commission in any and all legal proceedings which it may have the power to institute and which, pursuant to such power, it has instituted, and in all legal proceedings against it, and shall institute such legal proceedings which the commission may request or deem necessary, provided it has the power to institute them, to enforce the provisions of this title or compel obedience to and observance of the same by any person, firm, company, or corporation, upon which such obedience or observance is imposed. The attorney general with the approval of the governor may employ any special counsel to institute or defend such legal proceedings or to assist the attorney general therein, and to contract with the special counsel concerning a reasonable compensation for his or their services, which compensation shall be paid out of the treasury on a warrant drawn by the comptroller on the treasury upon approval by the governor (1907, p. 43).

Sec. 76. Rehearings;—Any time after an order has been made by the commission, any person interested therein may apply for a rehearing in respect to any matter determined

therein, and the commission shall grant and hold such rehearing within sixty days after the said application therefor has been filed, and such rehearing shall be subject to such rules as the commission may prescribe. Application for such rehearing shall not excuse any utility or person from complying with or obeying an order of the commission, or operate in any manner to stay or postpone the enforcement thereof except as the commission may by order direct. Any order of the commission made after such rehearing shall have the same force and effect as an original order, but shall not affect any right, or the enforcement of any right, arising from or by virtue of compliance with the original order prior to the order made after rehearing.

Sec. 78. Courts may compel compliance with orders of commission and punish failure;—In case of failure or refusal on the part of any person to comply with any valid order of the commission or of any commissioner, or any subpoena, or on the refusal of any witness to testify or answer as to any matter regarding which he may be lawfully interrogated, any circuit court in this state, or any judge thereof, on application of a commissioner, may issue an attachment for such person and compel him to comply with such order, or to attend before the commission and produce such documents and give his testimony upon such matters as may be lawfully required, and the Court or judge shall have power to punish for contempt as in cases of disobedience of a like order or subpoena issued by or from such court, or a refusal to testify therein.

Sec. 79. Appeals from orders of commission.—From any final action or order of the commission in the exercise of the jurisdiction, power, and authority conferred upon it by this title, an appeal therefrom shall lie to the circuit court of Montgomery County, sitting in equity, except appeals under chapter three of this title, and thence to the supreme court of Alabama. All appeals shall be taken within thirty days from the date of such action or order and shall be granted as a matter of right and be deemed perfected by filing with public service commission a bond for security of cost of said appeal when the appellant is a utility or person,

and by filing notice of an appeal when the appellant is the State of Alabama. (1909, p. 96; 1932, Ex. Sess., p. 233.)

Sec. 81. Right to supersede order.—On any such appeal any utility, interested party, or intervenor may supersede any decree rendered by giving such supersedeas bond or bonds as may be appropriate to the proceedings as provided for herein for superseding an order or orders of the commission.

Sec. 82. Proceedings on appeal.—The commission's order shall be taken as prima facie just and reasonable. No new or additional evidence may be introduced in the circuit court except as to fraud or misconduct of some person engaged in the administration of this title and affecting the order, ruling or award appealed from, but the court shall otherwise hear the case upon the certified record and shall set aside the order if the court finds that: the commission erred to the prejudice of appellant's substantial rights in its application of the law; or, the order, decision or award was procured by fraud or was based upon findings of facts contrary to the substantial weight of the evidence. Provided, however, the court may, instead of setting aside the order, remand the case to the commission for further proceedings in conformity with the direction of the court. The court may, in advance of judgment and upon a sufficient showing, remand the cause to the commission for the purpose of taking additional testimony or other proceedings. (1932, Ex. Sess., p. 233.)

Sec. 84. Appeal does not supersede order;—supersedeas bond.—No appeal shall stay or supersede the order or action appealed from unless the appellate court or judge thereof, upon hearing and notice, after consideration of the testimony, taken before the commission, shall so direct. If the appeal be from an order of the commission reducing or refusing to increase such rates, fares, charges, or any of them, or any schedule, or part or parts of any schedule of such rates, fares or charges, the appellate court, or judge thereof, shall not so direct or order a supersedeas or stay of the action or order appealed from without requiring as

a condition precedent to the granting of said supersedeas that the utility applying for the same shall execute and file with the clerk of said court a bond, which bond shall be as hereinafter provided.

Sec. 106. Permit to abandon service.—No transportation company subject to this chapter shall abandon all or any portion of its service to the public or the operation of any of its lines, properties, or plant which would affect the service it is rendering the public, except ordinary discontinuances of service for nonpayment of charges, nonuser, violations of rules and regulations or similar reasons in the usual course of business, unless and until there shall first have been filed an application for a permit to abandon service and obtained from the commission a permit allowing such abandonment.

Sec. 399. Penalty for charging excessive rates, granting rebates, or violating commission's order, etc.—Any utility doing business in this state, or any of its authorized agents, officers or employees, who is guilty of knowingly or willfully charging, demanding, or receiving any rate or charge for any commodity or service different from that authorized by its lawful tariffs on file with the Alabama Public Service Commission, or who is guilty of knowingly or willfully granting or giving to any person or persons any concession or rebate in respect of its lawful charges or rates, or who knowingly or willfully violates, or procures, aids or abets a violation of, any lawful order or decree of said commission, shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than one thousand dollars for each offense. In the case of a violation of said commission's orders or decrees, each day's violation shall be deemed a separate offense. (Ib.; 1932, Ex. Sess., p. 209.)

Section 400. Violations of statutes as to reasonable rates, adequate service and unjust discriminations; penalty.—Every officer, agent or employee of such common carrier or railroad corporation who shall violate or procure, aid, or abet any violation by such common carrier, or railroad corporation, or any of the statutes of this state relating to

reasonable rates, adequate service, and unjust discriminations of the public service of any common carrier of this state, or who shall fail to obey, observe, or comply with any order of the public service commission, or any provisions of any order of said commission, or who procures, aids or abets any such common carrier, or corporation, in its failure to obey, observe, and comply with any such order, direction, or provision relating to reasonable rates, adequate service and unjust discrimination by common carriers of this state, shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not exceeding one thousand dollars, to be fixed by the court. (1907, p. 23.)

UNITED STATES STATUTES

United States Code, Title 28:

Sec. 1253. Direct appeals from decisions of three-judge courts.

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Sec. 2101. Supreme Court; time for appeal or certiorari; docketing; stay.

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay. As amended May 24, 1949, c. 1939, Sec. 106, 63 Stat. 104.

Sec. 2281. Injunction against enforcement of State statute; three judge court required.

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district

court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under Section 2284 of this title.

Sec. 2284. Three-judge district court; composition; procedure.

In any action or proceeding required by an Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail by the clerk, and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days' notice served upon the attorney general of the State.

APR 5 1951
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 660

ALABAMA PUBLIC SERVICE COMMISSION, GORDON PERSONS, ITS PRESIDENT, ET AL.,
Appellants,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

W. A. NORTHCUTT,
ROBERT E. STEINER, JR.,
Counsel for Appellees.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
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Civil Action 698 N

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, A CORPORATION,

Plaintiff,

vs.

ALABAMA PUBLIC SERVICE COMMISSION, GORDON PERSONS, ITS PRESIDENT, AND JIMMY HITCHCOCK AND C. C. (JACK) OWEN, ASSOCIATE COMMISSIONERS; AND A. A. CARMICHAEL, ATTORNEY GENERAL OF ALABAMA,

Defendants

APPELLEE'S MOTION TO DISMISS OR AFFIRM AND STATEMENT AS TO JURISDICTION

Appellee, Louisville and Nashville Railroad Company, believing that the matters set forth below demonstrate the lack of substance in the questions raised by this appeal, files this its statement in opposition to appellants' statement as to jurisdiction. Appellee also files this its motion to dismiss the appeal, or in the alternative to affirm the judgment of the court below on the ground that the questions raised by appellants are unsubstantial.

While the cause is one which would otherwise be reviewable by the Supreme Court on direct appeal, appellee as-

serts that the unsubstantial character of the grounds stated by appellants is so apparent as to warrant this court in summarily disposing of this appeal without further hearing. Appellee further shows that the judgment of the court below must, in any event, be affirmed upon the findings of that court as to the confiscatory character of the order of Alabama Public Service Commission sought to be enforced by appellants, but enjoined by the court below.

I

Statement of the Issues on Appeal

Only procedural questions are raised in this appeal by appellants. Appellants have not raised any issue as to the correctness of the decision of the court below on the merits or facts in its holding that the contested order of Alabama Public Service Commission was confiscatory and unconstitutional.

The procedural and only issues involved in this appeal are:

(a) Since the complaint prayed for an interlocutory and permanent injunction to restrain the confiscatory and unconstitutional order of Alabama Public Service Commission under an Alabama statute, was a 3-judge court the proper tribunal to hear and decide the case?

(b) Since confiscation of plaintiff's property by the order of Alabama Public Service Commission was alleged and proved, should the 3-judge Federal Court surrender its jurisdiction to state courts where no speedy, plain and efficient remedy was afforded therein?

(c) Where all material facts showing that the order of Alabama Public Service Commission was confiscatory and unconstitutional were proved, should the Federal Court abandon or decline jurisdiction because in moulding its decree against the enforcement of such confiscatory and unconstitutional order, incidental re-

lief was granted by enjoining the enforcement of state penalty statutes which would otherwise be applicable to plaintiff-appellee upon its failure or refusal to comply with such order?

II

Statement of Facts

The facts leading to this litigation are as follows:

For many years, Louisville and Nashville Railroad Company, plaintiff-appellee, has operated passenger trains Nos. 27 and 28 between Georgiana, Alabama and Graceville, Florida. In recent years, the operation of these trains has resulted in increasingly large losses because of the competition of other forms of transportation, particularly that of buses and privately owned motor vehicles. L & N could not discontinue trains 27 and 28 until it received authority from Alabama Public Service Commission, as required by Title 48, Sections 35 and 106, Alabama Code of 1940 (see appendix). If it had discontinued such service without authority, L & N and its officers would be subject to the heavy penalties provided by the applicable Alabama statutes (see appendix).

On November 6, 1947, L & N filed its application with appellant Alabama Public Service Commission for authority to discontinue these passenger trains insofar as their intrastate operation between Georgiana, Alabama, and the Alabama-Florida state line was concerned in order to eliminate the heavy losses involved in their operation. (It is a matter of record about which there can be no dispute, that since the decision of this case by the court below, the Florida Commission granted appellee's application to discontinue operation of these passenger trains within the State of Florida). After protracted delay, notwithstanding repeated requests for a hearing, the Alabama Commis-

sion set the case for hearing on August 19, 1948, in Andalusia, Alabama. L & N introduced and concluded its evidence at said hearing, but over its objection, the case was continued for further hearings. Again came protracted delay, notwithstanding repeated requests for an early conclusion of the case, but it was not until January 11, 1950 that further hearing was had and the case taken for an order.

Under the law of Alabama (Title 48, Section 77, Code of Alabama of 1940, see appendix), the Alabama Commission is required to decide all cases submitted to it within 90 days, provided that it can extend the time for decision an additional 90 days "for good cause shown". Although 29 months had then elapsed, the Alabama Commission extended the time for decision an additional 90 days, the "good cause" assigned being the furnishing of 1950 census figures—a matter of which the Commission and the courts take judicial notice. At long last, on July 28, 1950, the Commission issued its order denying L & N's application and requiring the continued operation of these trains. Thus for 32 months and 22 days, the Alabama Commission required L & N to operate these two passenger trains in Alabama at an out of pocket loss to it of approximately $56,000 per year, amounting to $188.00 per day at the end of said period, and averaging $166.00 per day throughout the entire period. Thus during the period from the time when L & N filed its petition to discontinue these trains to the date of the Alabama Commission's final order denying the application and requiring the continued operation of these trains, L & N sustained an out of pocket loss of more than $160,000.00.

Having futilely pursued its "administrative remedies" for 32 months and 22 days without relief, appellee then sought relief by filing its complaint in the Federal Court

praying for an interlocutory and permanent injunction, on the ground that the order of the Alabama Commission requiring the continued operation of these passenger trains violated the 14th Amendment of the Constitution of the United States by taking its property without due process of law, by confiscating its property without just compensation; and violated Article 1, Section 8 of the Constitution of the United States by imposing an unreasonable burden on interstate commerce and on interstate freight and passenger rates.

Incidental and ancillary to the primary relief of enjoining the Alabama Commission's order requiring the continued operation of these passenger trains, appellee sought also to enjoin the Commission and the Attorney General of Alabama from enforcing the heavy penalties and sanctions provided by the statutes of Alabama (see appendix) for failure to comply with orders of Alabama Public Service Commission.

By the provisions of 28 U.S.C.A., Sections 2281 and 2284 (see appendix) and the unbroken line of decisions construing these sections, a proceeding to set aside or enjoin the enforcement of an order of a state administrative board or commission, as violative of the United States Constitution, requires the more solemn statutory 3-judge court as distinguished from the District Judge sitting alone. Such court was convened, and by stipulation of the parties the case was submitted on the merits for final decree and injunction as well as on the prayer for an interlocutory injunction. After hearing and considering the evidence, the 3-judge court held the Alabama Commission's order to be confiscatory and unconstitutional, and enjoined defendants from enforcing it or any penalties or sanctions against the railroad because of the discontinuance of the two passenger trains involved.

The Court in its findings, opinion and order held that the order of the Commission was illegal and confiscatory and deprived the L & N of its rights guaranteed by the United States Constitution. No appeal has been taken from that finding. (A copy of the 3-judge court's decree, findings of fact, conclusions of law and opinion are attached to appellant's "Statement as to Jurisdiction").

III

No Substantial Federal Question Is Presented

Appellants at the outset question the jurisdiction of the 3-judge District Court, on the theory that since Appellee did not attack the constitutionality of a state "statute," but instead attacked the constitutionality of the "order" of Alabama Public Service Commission requiring the continued operation of Trains 27 and 28, there was no jurisdiction in the 3-judge court pursuant to section 2281, Title 28, U.S.C. (See appendix).

Section 2281 was formerly section 380 of Title 28, U.S.C., or section 266 of the Judicial Code.

This feigned issue was decided against the State's contention in *Oklahoma Natural Gas Co.* v. *Russell*, 261 U.S., 290, 292, 67 L. Ed., 659, 661 (1923), in the clearcut opinion written by Mr. Justice Holmes for a unanimous court:

> "A doubt has been suggested whether these cases are within Section 266 of the Judicial Code, Act of March 3, 1911, chap. 230, 36 Stat. at L. 1086, 1162, as amended by the Act of March 4, 1913, chap. 160, 37 Stat. at L. 1013, Comp. Stat. Section 1243, 5 Fed. Stat. Anno. 2d ed. p. 984. The section originally forbade interlocutory injunctions restraining the action of state officers in the enforcement or execution of any statute of a state, upon the ground of its unconstitutionality, without a hearing by three judges. The amendment inserted after the words 'enforcement or execution of

such 'statute' the words 'or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state'; but did not change the statement of the ground, which still reads, 'the unconstitutionality of such statute'. So if the section is construed with narrow precision it may be argued that the unconsitutionality of the order is not enough. But this court has assumed repeatedly that the section was to be taken more broadly. Louisville & N. R. Co. v. Finn, 235 U.S. 601, 604, 59 L. Ed. 379, 382, P.U.R. 1915A, 121, 35 Sup. Ct. Rep. 146; Phoenix R. Co. v. Geary, 239 U.S. 277, 280, 281, 60 L. Ed. 287-289, 36 Sup. Ct. Rep. 45; Cumberland Teleph. & Teleg. Co. v. Louisiana Pub. Serv. Commission, November 20, 1922 (260 U.S. 212, ante 217, 43 Sup. Ct. Rep. 75); Western & A.R. Co. v. Railroad Commission, February 19, 1923 (261 U.S. 264, ante, 645, 43 Sup. Ct. Rep. 252). The amendment seems to have been introduced to prevent any question that such orders were within the section. It was superfluous, as the original statute covered them. Louisville & N. R. Co. v. Garrett, 231 U.S. 298, 301, 318, 58 L. Ed. 229, 238, 244, 34 Sup. Ct. Rep. 48; Atlantic Coast Line R. Co. v. Goldsboro, 232 U.S. 548, 555, 58 L. Ed. 721, 725, 34 Sup. Ct. Rep. 364; Grand Trunk Western R. Co. v. Railroad Commission, 221 U.S. 400, 403, 55 L. Ed. 786, 787, 31 Sup. Ct. Rep. 537. But it plainly was intended to enlarge, not to restrict, the law. We mention the matter simply to put doubts to rest."

Other railroads, similarly situated, have applied for and received identical relief from 3-judge Federal courts convened in various states and jurisdictions in the following cases:

Ann Arbor R. Co. v. *Michigan Public Service Commission*, 91 F. Supp. 668 (D. C., E.D. Michigan, July 6, 1950);

Southern Ry. Co. v. *Ala. Public Service Commission*, 91 F. Supp. 980 (D. C., M. D. Alabama, July 20, 1950);

Southern Ry. Co. v. *Ala. Public Service Commission*, 88 F. Supp. 441 (D. C., M. D. Alabama, Feb. 8, 1950);

Chicago, B. & Q. R. Co. v. *Board of Railroad Commissioners of Montana*, 78 F. Supp. 1010 (D. C. Montana 1947);

Atlantic Coast Line R. R. Co. v. *Public Service Commission of South Carolina*, 77 F. Supp. 675 (D. C., E. D. South Carolina 1948);

Northern Pacific Ry. Co. v. *Board of Railroad Commissioners of Montana*, 46 F. Supp. 340 (D. C. Montana 1942);

Great Northern Ry. Co. v. Nagle, 16 F. Supp. 532 (D. C. Montana 1936);

Delaware, L. & W. R. Co v. *Van Santvoord, et al*, 232 F. 978, (D. C., N. D. New York 1916);

Mississippi Railroad Commission v. *Mobile & O. R. Co.*, 244 U. S., 388, 61 L. Ed. 1216 (1917);

Atlantic Coast Line R. R. Co. v. *Ala. Public Service Commission*, 92 F. Supp. 579 (D. C., M D. Alabama, Aug. 23, 1950).

Obviously those courts were unanimous in their opinion that a 3-judge Federal court had jurisdiction, since in none of those cases was there any dissenting opinion or any hint of doubt that such jurisdiction existed.

Other cases in which the United States Supreme Court held proper the convening of a 3-judge Federal court to enjoin an order of a state administrative board or commission, following Mr. Justice Holmes in the *Oklahoma Natural Gas* case, are:

Sterling v. *Constantin*, 287 U. S., 378, 77 L. Ed. 375 (1932);

Herkness v. *Irion*, 278 U. S., 92, 73 L. Ed. 198 (1928);

Driscoll v. *Edison Lt. & Pr. Co.*, 307 U. S. 104, 83 L. Ed. 1134 (1938);

Corporation Commission of Oklahoma v. *Cary*, 296 U. S., 452, 80 L. Ed. 324 (1935);

Mountain States Power Co. v. *Public Service Commission*, 299 U. S., 167, 81 L. Ed. 99 (1936).

The order of the Alabama Commission sought to be enjoined by appellee was found and held by the court below to be confiscatory and violative of the 14th Amendment of the Federal Constitution. Appellee had long suffered such confiscation awaiting the hearing of its petition to discontinue these trains and the Commission's delayed decision. It was entitled to a plain, speedy and efficient remedy to relieve it from further confiscation.

> "Present confiscation is not atoned for by merely holding out the hope of a better life to come." *Mr. Justice Cardozo in West Ohio Gas Co.* v. *P. U. Comm. of Ohio*, 294 U. S., 79, 83, 79 L. Ed., 773, 777.

It sought and obtained such relief in a Federal Court. In this appeal, the Alabama Commission has not challenged the correctness of the decision of the court below on the merits and the facts of the case that, under the evidence, the order of the Alabama Commission was confiscatory and illegal. Certainly appellants cannot contend that its order challenged and complained of in the court below "had the quality of a supreme and unchallengeable edict, overriding all conflicting rights of property, and unreviewable through the judicial power of the Federal Government. If this extreme position could be deemed to be well taken, it is manifest that the fiat of [Alabama Public Commission], and not the Constitution of the United States, would be the supreme law of the land."—Mr. Chief Justice Hughes in *Sterling* v. *Constantin*, 287 U. S., 378, 397, 77 L. Ed., 375, 385.

Undoubtedly, this was a case for a 3-judge court. Can it be that this appeal by the Alabama Commission is simply another step in the long series of delays that have attended the course of this case—32 months and 22 days having elapsed from the filing of appellee's application to discontinue the trains to the Commission's order denying such application? Even if we were to assume that the 3-judge court did not have jurisdiction over the case, the proceedings before it and its order and judgment would not be void, and the Supreme Court would not order the case dismissed, but would simply reverse and remand the case for an order by the single judge of the District Court below. —*Phillips* v. *U. S.*, 312 U. S., 246, 85 L. Ed., 800 (1941). That Judge was a member of the 3-judge court, and it was he who wrote the opinion of that court in this case. Obviously, he would reach the same conclusion if he were deciding the case alone. Therefore, what does it profit the Alabama Commission to appeal solely from the procedure —not complaining of or attacking the correctness of the decision of the court below on the merits and facts of the case—other than further delay? If appellants contend that this case was one for decision by a single District Judge sitting as a District Court, rather than one for a 3-judge court, then obviously the same result or decision would be reached. If appellants contend that even a single District Judge sitting as a District Court had no jurisdiction over the case, then the entire system of concurrent Federal jurisdiction over violations of the Federal Constitution would cease.

Appellants next contend that the Federal Court should have declined to exercise jurisdiction in this case for reasons of comity.

> "Rules of comity or convenience must give way to constitutional rights."

Mr. Justice Holmes in Oklahoma Natural Gas Co. v. *Russell,* 261 U. S., 290, 293, 67 L. Ed., 659, 662.

Other cases holding that the Federal Court properly exercises jurisdiction in cases involving confiscation and Federal constitutional questions are:

Corporation Commission of Oklahoma v. *Cary,* 296 U. S., 452, 80 L. Ed., 324 (1935);
Mountain States Power Co. v. *Public Service Comm. of Montana,* 299 U. S., 167, 81 L. Ed., 99 (1936).

Section 2284(5) of Title 28, U. S. C., furnishes the test of when proceedings in the Federal Court should be stayed, namely, when like proceedings are pending in a state court having jurisdiction thereover. Here, no such proceedings were or are pending in the state courts of Alabama.

There has been no authoritative declaration by the courts of Alabama that appellee has the right to supersede an order of the Alabama Public Service Commission in a train discontinuance case under the provisions of Title 48, Section 84 (see appendix), and no statement or admission to that effect by the Attorney General of Alabama can in any way bind the courts of Alabama. Thus it cannot be said that appellee's remedies in the state court are "plain" or "efficient." Appellee sought relief from the state administrative body for almost 33 months without avail. It sought and obtained relief from the Federal District Court in approximately 36 days. No further comment need be made as to whether state remedies are as "speedy" as Federal in this case. Furthermore, where confiscation is alleged and proved under the Federal Constitution, nothing can preclude the jurisdiction of the Federal Court thereover.

The allegations of appellee in its complaint, and the findings and decision of the court below that the order of the Alabama Commission was confiscatory and unconsti-

tutional are unchallenged in this appeal. Thus the contention of appellants that the court below should decline to exercise jurisdiction because of "complicated questions of fact" is entirely without merit. There is no novel question of state law or state policy involved in this case. There was and is involved in it the question of confiscation under the Federal Constitution. As to the policy of the State, that was decided in *Alabama Public Serv. Comm.* v. *A. C. L. R. Co.*, 45 So. (2d) 449, 451 (Ala. Sup. Ct. March, 1950,) where the Court said:

> "There is no other railroad service in that area. There is a good hard surface road and bus service for passengers in all direction, with one truck freight common carrier. *The passenger patronage would not demand a continuance of the railroad service*" (emphasis supplied).

This case is the fourth of a series of like cases in which the Alabama Commission has arbitrarily and unconstitutionally ordered railroads to continue unprofitable passenger service in spite of the policy laid down by the Alabama Supreme Court; and in all of them such orders have been enjoined by a 3-judge court. Two additional and subsequent orders of the Alabama Commission requiring the continuance of passenger train service are now before 3-judge courts in Alabama on applications for injunction. The Alabama Commission, by its order in this case, has ignored the pronouncement of the Alabama Supreme Court and the decisions of the 3-judge courts, and it now asks the Supreme Court to make the order of the Alabama Commission, even though confiscatory, supreme by surrendering jurisdiction.

As to enjoining penalties or sanctions: Appellants complain that the court below enjoined them from undertaking to apply any penalties or sanctions against appellee for its failure or refusal to continue the operation of the trains in

question. In fact, appellants contend that a Federal Court has no right to enjoin the enforcement of a state criminal law. Such is not an issue here, nor is it involved. The relief sought by appellee's complaint, and the real relief granted by the 3-judge court below, was against confiscation of appellee's property, which would have resulted from requiring the continued operation of trains with such heavy financial losses. The court below found and decided that appellee was entitled to relief, and accordingly enjoined the enforcement of the order of the Alabama Commission. Obviously such relief would be ineffectual if appellee, or its representatives, could be harassed by penalties or prosecutions under any penalty statutes of Alabama for failure to comply with the Alabama Commission's order, which order the court below had set aside and held to be illegal and confiscatory. By this action, the court below made its decree effective.

Clearly this action comes under the well defined exception established by this Court in the case of *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 451, 71 L. Ed., 1146, 1150 (1927):

> "• • • But an exception to this rule exists when the prevention of such prosecutions under alleged unconstitutional enactments is essential to the safeguarding of rights of property, and when the circumstances are exceptional and the danger of irreparable loss is both great and immediate (citing other U. S. Supreme Court cases)".

A similar holding is *Beal* v. *Missouri Pacific R. Co.*, 312 U. S., 45, 49, 85 L. Ed., 577, 579 (1941). See also *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S., 89, 79 L. Ed., 1322 (1935).

Appellee further submits that questions presented in this appeal have been so definitely determined by decisions of the Supreme Court, following which so many 3-judge courts

have assumed jurisdiction over like cases, that no substantial Federal question is presented by this appeal which would entitle appellants to invoke the jurisdiction of the Supreme Court of the United States.

WHEREFORE, appellee respectfully moves that this appeal be dismissed, or that the judgment and decree of the Court below be affirmed.

Respectfully Submitted,

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APPENDIX

ALABAMA STATUTES

All citations are to the Code of Alabama of 1940.

Abandonment of Service:

Title 48, section 35.

"No utility shall abandon all or any portion of its service to the public except ordinary discontinuance of service for nonpayment of charges, nonuser and similar reasons in the usual course of business, unless and until written application is first made to the commission for the issuance of a certificate that the present or future public convenience or necessity permits such abandonment, and the issuance of such a certificate. Upon the filing of such application, and after a hearing of all parties interested, the commission may, or may not, in its discretion, issue such certificate."

Title 48, section 106.

"No transportation company subject to this chapter shall abandon all or any portion of its service to the public or the operation of any of its lines, properties, or plant which would affect the service it is rendering the public, except ordinary discontinuance of service for nonpayment of charges, nonuser, violations of rules and regulations or similar reasons in the usual course of business, unless and until there shall first have been filed an application for a permit to abandon service and obtained from the commission a permit allowing such abandonment."

Time for Decision:

Title 48, section 77.

"The commission shall within ninety days after the completion of the hearings and arguments, if any, and the filing of briefs, if any, in any case submitted to it, or upon a rehearing thereof, decide said cause, or if for any good and valid reason it shall be unable to decide the same within said period, then at the expiration of said ninety day pe-

riod, the commission shall make and file and serve upon all the interested parties a written order stating its reason for its inability to decide said cause within said time, and may extend the time for decision for a period not to exceed ninety days."

Penalty Statutes:

Title 48, section 78.

"In case of failure or refusal on the part of any person to comply with any valid order of the commission or of any commissioner, or any subpoena, or on the refusal of any witness to testify or answer as to any matter regarding which he may be lawfully interrogated, any circuit court in this state, or any judge thereof, on application of a commissioner, may issue an attachment for such person and compel him to comply with such order, or to attend before the commission and produce such documents and give his testimony upon such matters as may be lawfully required, and the court or judge shall have power to punish for contempt as in cases of disobedience of a like order or subpoena issued by or from such court, or a refusal to testify therein."

Title 48, section 163.

"Every violation of the provisions of this chapter, or of any order, decision, rule, regulation, direction, or requirement of the commission, or any part or portion thereof, by any transportation company, is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense. In construing and enforcing the provisions of this chapter relating to penalties, the act, omission, or failure of any officer, agent, or employee of any transportation company acting within the scope of his official duties or employment shall in every case be deemed to be the act, omission or failure of such transportation company."

Title 48, section 399.

"Any utility doing business in this state, or any of its authorized agents, officers or employees, who is guilty of

knowingly or willfully charging, demanding, or receiving any rate or charge for any commodity or service different from that authorized by its lawful tariffs on file with the Alabama public service commission, or who is guilty of knowingly or willfully granting or giving to any person or persons any concession or rebate in respect of its lawful charges or rates, or who knowingly or willfully violates, or procures, aids or abets a violation of, any lawful order or decree of said commission, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not more than one thousand dollars for each offense. In the case of a violation of said commission's orders or decrees, each day's violation shall be deemed to be a separate offense."

Title 48, section 400.

"Every officer, agent, or employe of such common carrier or railroad corporation who shall violate or procure, aid or abet any violation by such common carrier, or railroad corporation, of any of the statutes of this state relating to reasonable rates, adequate service, and unjust discriminations of the public service of any common carrier of this state, or who shall fail to obey, observe, or comply with any order of the public service commission, or any provisions of any order of said commission, or who procures, aids or abets any such common carrier, or corporation, in its failure to obey, observe, and comply with any such order, direction, or provision relating to reasonable rates, adequate service and unjust discrimination by common carriers of this state, shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not exceeding one thousand dollars, to be fixed by the court."

Supersedeas:

Title 48, section 84.

"No appeal shall stay or supersede the order or action appealed from unless the appellate court or judge thereof, upon hearing and notice, after consideration of the testimony, taken before the commission, shall so direct. If the

appeal be from an order of the commission reducing or refusing to grant such rates, fares or charges, or any of them, or any schedule, or part or parts of any schedule of such rates, fares or charges, the appellate court, or judge thereof, shall not so direct or order a supersedeas or stay of the action or order appealed from without requiring as a condition precedent to the granting of said supersedeas that the utility applying for the same shall execute and file with the clerk of said court a bond, which bond shall be as hereinafter provided."

UNITED STATES STATUTES

U. S. Code, Title 28, section 2281:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any office of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

U. S. Code, Title 28, section 2284:

"In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

"(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

"(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders,

at least five days notice of the hearing shall be given to the governor and attorney general of the State.

"If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

"Such notice shall be given by registered mail by the clerk, and shall be complete on the mailing thereof.

"(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

"(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

"(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

"A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such

State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State."